No. 1425

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUGET SOUND NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

MARY H. LAVENDER, CHARLES STANLEY and SAMUEL DARLIN,
Defendants in Error.

PETITION FOR REHEARING

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

IRA BRONSON,
H. R. TREFETHEN,
Attorneys for Plaintiff in Error.

[illegible]

FILED

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUGET SOUND NAVIGATION COMPANY, a Corporation, Plaintiff in Error vs. MARY R. LAVENDER, CHARLES STANLEY and SAMUEL BARLO, Defendants in Error	No. 1425

PETITION FOR REHEARING

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division

---

We realize that a litigant should be very reluctant to petition an Appellate Court for a reconsideration of a case once formally passed upon, and that only in case the Court may perhaps be considered to have inadvertently overlooked the exact motive of certain evidence bearing upon an important point in contention will such petition be of any avail.

In the case at bar the plaintiff in error felt very confident of a reversal, but cheerfully acquiesces in those points of the case which the Court has apparently decided adverse to it. The only point to which we beg leave to call the Court's attention is that set forth upon the Sixth page of the Opinion as submitted to us, namely, with reference to the right of the plaintiff in error to an instructed verdict upon the ground that decedent was not shown to have come to his death through any defective port *as left by the plaintiff in error* or its employees, except perhaps himself. In that connection we most respectfully urge that the following statement of the Court, at the bottom of the Sixth page of the Opinion, is in error with reference to the facts, that is to say, the statement as follows, "*There was proof tending to show that the gate had been fastened at but one end* and that if one opened the upper doors the result would be to precipitate him into the water through the yielding of the unfastened lower gate." What we desire to urge is that the evidence, with reference to the first clause of this sentence, which of course is the crucial point upon this branch of the case, was uncontradicted, *that the mate of the vessel had himself* properly fastened this port in question at Four o'clock on the evening of the night of the accident. This evidence is wholly uncontradicted.

See pages 108 and 109 of the Transcript.

This then shows that the port was properly fastened and was not defective when the vessel left port. The next man shown to have touched this port was the

decedent, when it is again uncontradicted testimony that he was seen shoving or kicking at it with his foot. (Transcript, pp. 138 and 139.) We assume that the Court would inevitably conclude that this was not a proper way to open this big port, and when he is shown to have been the one who handled a port and had every means in his power to get it out of order, and that he was using force of an unnatural kind to open it, it would seem to irresistibly call for the conclusion that he was the one who got it out of repair.

We say this in explanation of our statement that we think the Court erred in the first paragraph of the statement quoted above from the Opinion. We think the evidence offered with respect to the fastening of the port, after it was picked up could certainly not go farther back than the time when the decedent himself was shown to have been using unnatural and unreasonable force in trying to drive it out of its position.

And in view of the uncontradicted evidence that this port was properly and securely fastened a short time preceding the accident in question, we respectfully submit that there was no evidence of the defendant having left the port unfastened or insecurely fastened.

The plaintiff in error feels that the distinction that we are pointing out might very readily escape the attention of a jury and result in a miscarriage of justice, and the fastening upon us of the consequence of a deplorable accident, but none the less an accident pure and simple.

In view of the fact that this case was argued to the

United States Circuit Court of Appeals nearly a year ago, and that a Petition for Rehearing intervened before the final decision was rendered, we trust that we may ask the indulgence of the Court for a comparison of the few pages of the evidence in connection with this petition, to-wit, pages 108 and 109, wherein the Mate Stanley testified to his having left the port tight and solid, and pages 138 and 139 where Mr. Dugal testified to having seen him kicking the port.

If, upon a consideration of this, the Court thinks there was evidence to go to the jury we most respectfully and cheerfully submit to its judgment.

Very respectfully submitted,

IRA BRONSON and
D. B. TREFETHEN,
Attorneys for Plaintiff in Error.

State of Washington, }
County of King. } ss.

D. B. Trefethen, being first duly sworn, on oath deposes and says: That he is one of the attorneys for Appellant in Error in the above entitled cause; that he has read the foregoing Petition for Rehearing, knows the contents thereof, and that in his judgment said Petition is well founded; said Petition is not interposed for delay.

D. B. Trefethen

Subscribed and sworn to before me this 26th day of March, 1908.

Notary Public in and for the State of Washington, residing at Seattle.